

INTRODUCTION THIRTIETH ANNUAL ADMINISTRATIVE LAW ISSUE

A NONDELEGATION DOCTRINE FOR THE DIGITAL AGE?

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This is the *Duke Law Journal*'s thirtieth annual administrative law issue. Its title, "Governance of the Internet," promises some link between the Internet and the world of administrative law. Doubtless there are many possible connections to discuss; electronic versions of notice and comment, say, or the use of the Internet to make administrative functions more efficient, convenient, and transparent. These topics are worthy, I am sure, but they are also intensely *dull*. Yes, the Internet will have an effect on the administrative state, just as the Eisenhower freeway building program had an effect on the administrative state—helping to create the unified national market, the mobile population, and the mercurial movements of capital that form the context for today's administrative law. Yet one would hardly have a symposium on "Administrative Law and the I-95 Freeway." To be interesting, thought-provoking, or just useful, a symposium has to offer more of a connection between administrative law and the Internet than simply the ampersand in the title. Does the Internet transform the regulatory state in ways that administrative law must recognize and respond to? Are the descriptive and normative assumptions on which the doctrinal framework rests changed in the same way that the New Deal changed underlying assumptions about economics, commerce, and the Constitution? I think that the answer to that question is "yes," although the road to that answer is

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[†] Thanks go to Larry Lessig, whose work continues to lead the way in this field, to Michael Froomkin and Jonathan Weinberg for their contributions to this symposium, to my colleague Francesca Bignami for her insights on the nondelegation doctrine, to the editors of the *Duke Law Journal*, and to John Garvish for his research work.

circuitous and the main focus of the Symposium seems, at first, surprisingly narrow as the basis for such a claim.

On October 23, 1998, the *New York Times* ran a story by Carl Kaplan entitled *A Kind of Constitutional Convention for the Internet*.¹ For readers who had supposed that the Internet was (a) ungovernable, and (b) largely an agglomeration of *private* activity, the idea of a constitutional convention probably seemed jarring. Stranger still, the subject of the article, a nonprofit corporation known as the "Internet Corporation for Assigned Names and Numbers," picked by the U.S. government to handle the administration of Internet domain names, had all the apparent glamour of a commission to decide on telephone area codes. This was hardly the stuff of Philadelphia or Runnymede. But as the article pointed out, this entity, known by its unlovely acronym "ICANN," was actually in a position to exercise a substantial degree of power over the supposedly ungovernable world of the Internet. Entrusted with control of the domain name system (DNS) and important features of the assignment of Internet protocol (IP) numbers, ICANN had effective power over the only centralized feature of this famously decentralized system. As the papers presented in this Symposium explain, without a single agreed-upon and continuously updated file, which maps IP numbers such as 216.33.139.78 onto domain names such as <http://james-boyle.com>, there is no such thing as "the" Internet. If your site is removed from this file, it will, for all practical purposes, cease to exist for the rest of the world. ICANN, therefore, can, and does, insist that those who wish to be "on" the Internet as we know it must comply with certain conditions.² Since it also controls the creation of top-level domain names, such as .com, .org, and .net, it can also make policy about the available world of Internet addresses. Thus, from setting policy about trademarks and domain names to deciding whether there will be new top-level domain names, such as .union, ICANN already exercises considerable power and is in a position to exercise still more. Given

1. Carl S. Kaplan, *A Kind of Constitutional Convention for the Internet*, N.Y. TIMES, Oct. 23, 1998, <http://www.nytimes.com/library/tech/98/10/cyber/cyberlaw/23law.html> (on file with the *Duke Law Journal*).

2. In theory, of course, as both authors point out, it would be possible to point one's browser towards a different root file—thus allowing an entirely different assignation of domain names. But "splitting the root," proliferating authoritative domain name systems, would mean the end of "the" Internet and the growth of different and incompatible systems of addresses; to most Internet policy analysts, this would be to the functioning of the network what the Tower of Babel was to mutual linguistic comprehension.

the importance which the Internet has assumed in world culture, commerce, and communication in a few short years, and the absence of other central points for the exercise of regulatory power over the Internet, it would be hard to overstate ICANN's potential significance.

The authors in this Symposium, Professor Michael Froomkin and Professor Jonathan Weinberg, give an extended, thoughtful, and largely critical account of ICANN's formation, its internal processes, its accountability, and its ultimate legitimacy. Professor Froomkin has the remarkable distinction of having produced the single most complete account of the tangled history of ICANN and its relationship with the United States government. (The complexity of the story may be judged by the length of the article required to recount it.) Professor Weinberg provides a fluid but briefer account, focusing on the twists and turns of the policy process that ended in ICANN; in most significant respects, his picture and Professor Froomkin's agree.

But what does all of this have to do with administrative law? The authors give us two answers, I think, on different levels of abstraction. Professor Froomkin argues convincingly that ICANN simply fails to meet the basic requirements of U.S. administrative and constitutional law:

The United States government is managing a critical portion of the Internet's infrastructure in violation of the Administrative Procedures Act (APA) and the Constitution. . . . If the U.S. government is laundering its policymaking through ICANN, it violates the APA; if ICANN is, in fact, independent, then the federal government's decision to have ICANN manage a public resource of such importance and to allow—indeed, require—it to enforce regulatory conditions on users of that resource violates the nondelegation doctrine of the U.S. Constitution.³

His argument thus moves like a “fork” in chess. ICANN is either too independent or too dependent; it either violates the Constitution or the APA. The argument is a provocative and persuasive one which, if accepted by the courts, would have dramatic consequences for the regulation of the domain name system. Professor Weinberg focuses on a slightly higher level of abstraction. Comparing the

3. A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20 (2000).

debates over ICANN's legitimacy to those over the legitimacy of agency action, he argues that

ICANN's exercise of authority looked, walked, and quacked like public regulatory power. This raised a crucial hurdle for ICANN to surmount in any quest for public legitimacy: Was its exercise of this power consistent with our usual thinking about public power and public policymaking? American political philosophy is built around a public-private distinction in which private actors presumptively have control over their own resources, but it is problematic for them to control public resources. A private entity wielding what amounts to public power may be subjected to constitutional restraints designed to ensure that its power is exercised consistently with democratic values.⁴

Thus, whether we focus on administrative law and procedure, constitutional law, or democratic legitimacy, the same basic message is sounded: ICANN is both important and transgressive. It fulfills vital functions; indeed, it may prove to be the only firm regulatory handle on the Internet, and yet it occupies a limbo between public and private, technical harmonization and political policy choice, contractual agency relationship and delegated rulemaker, state actor and private corporation. What's more, ICANN's claims to authority and legitimacy have an internal instability. The more that ICANN claims to be private, technical, neutral, and facilitative, the less appropriate it seems for it to set the rules that in practice will govern conditions for, and disputes over, domain names. The more that ICANN seems like an institution of the emerging civil society of cyberspace, the less acceptable are its arcane procedures and its mood swings over the value of international democratic control. As a technical standard-setting organization, it does too much; as an international democratic organization, it falls short.

As it stands, Professor Froomkin and Professor Weinberg have given us something of great value: an application of the traditional doctrinal and theoretical tools of administrative law to a significant entity in Internet regulation. But implicit in their papers is another point which has even greater theoretical importance—a need for the development of new administrative and constitutional law in order to deal with the types of regulatory practices most likely in cyberspace.

4. Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 217 (2000).

The Internet is a global, distributed network carrying a type of content—information—that is hard to regulate at the best of times.⁵ Because the network is global, national regulation merely invites relocation to another node in another jurisdiction. Because the network is distributed, with no central point⁶ to shut down or censor, it is very hard to grant partial access; the tap is either off or on full. Because the content is intangible, nonrivalrous,⁷ and infinitely reproducible, it is hard to police.

Many lay people, and a few legal scholars, have an implicit Austinian vision of law—roughly speaking, a command backed by threats, coming from a political superior who acknowledges no other superior, aimed at a geographically-defined population that renders the sovereign habitual obedience.⁸ As I have argued elsewhere,⁹ it is hard to imagine a model of law better designed to fail at regulating the Internet. The clumsy fingers of the Leviathan cannot hold back the liquid flows of information; the sword's swing arrives too late; the parties have already relocated to another jurisdiction, hidden themselves with cryptography or “anonymous remailers,” or simply vanished into the digital murk. Seeing these characteristics, many have concluded that the Internet will simply be impossible to police; states will wither away as their regulatory powers are undercut and their tax flows disappear into private currencies and anonymous international transactions, hidden behind the walls of asymmetric cryptography. From this point of view, our Symposium is best seen as a kind of legal history; the Internet will do to the administrative state what the asteroid did to the dinosaurs.

But a number of scholars have argued that this assessment counts out the possibility of regulation too quickly, though the *form* of that regulation may not be the familiar command and control mechanism. In *Code and Other Laws of Cyberspace*,¹⁰ Larry Lessig argues that the architecture of the Internet—the hardware and software choices that define the system—can be a form of regulation. Architecture can

5. For an expansion of these points, see generally James Boyle, *Foucault in Cyberspace; Surveillance, Sovereignty, and Hard-Wired Censors*, 66 U. CIN. L. REV. 177 (1997).

6. With the arguable exception, as noted earlier, of the DNS.

7. Property is “non rivalrous” when use by one party does not impede use or possession by another; information can be used or possessed by multiple parties at close to zero marginal cost, without impairing the use of the original owner or creator.

8. See generally JOHN AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

9. See generally Boyle, *supra* note 5.

10. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 85-99 (1999).

promote anonymity or it can require constant certification of identity. It can make filtration of content hard or easy. These are significant choices with important public consequences, but Lessig points out that they are frequently made without public discussion or review—as if they were private and merely technical.¹¹

My own work has argued that regulation of the Internet will increasingly rely on a three-fold strategy—privatization, “propertytization,” and the use of technological controls.¹² For the world of the global network, the effective form of regulation is likely to be built into architecture, designed around property-right claims, and both promulgated and enforced by quasi-private organizations.

Privatization: First, unable to respond at Internet speed, and limited by pesky constitutional constraints, the state can use private surrogates to achieve its goals.¹³ The Clinton administration’s original plan for copyright enforcement in cyberspace, for example, was to make Internet service providers (ISPs) strictly liable for copyright violations by their subscribers—thus creating a private police force, largely free of statutory and constitutional privacy constraints, with strong incentives to come up with innovative surveillance and technical enforcement measures.¹⁴ Another example, which mixes the privatization strategy and the strategy of technological hardwiring, comes from outside the Internet: the “V-chip” rating system for televisions. While the V-chip rating system is in some senses “voluntary,” the device itself is mandated for television receivers by section 551 of the Telecommunications Act of 1996.¹⁵ The V-chip decodes a set of ratings agreed to by private parties and suggested by

11. Although most attention has been paid to this aspect of Lessig’s work, he also deals with the way in which social norms, market forces, and legal rules interact in any pattern of regulation. *See generally id.* (addressing the way in which social norms, market forces, and legal rules interact in any pattern of regulation).

12. *See generally* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND CONSTRUCTION OF THE INFORMATION SOCIETY (1996); Boyle, *supra* note 5; James Boyle, *The First Amendment in Cyberspace; The Clinton Years*, 63 LAW & CONTEMP. PROBS. (forthcoming 2000) [hereinafter Boyle, *First Amendment in Cyberspace*]; James Boyle, Net Total: Law, Politics, and Property in Cyberspace (unpublished manuscript, on file with the *Duke Law Journal*) [hereinafter Boyle, Net Total].

13. In the most limited sense, of course, private law rules have always done this. For example, product liability law creates a complex web of private safety incentives, backed by a threat of damages.

14. *See* James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 100-07 (1997); James Boyle, *Intellectual Property Policy On-Line: A Young Person’s Guide*, 10 HARV. J.L. & TECH. 47, 101-05 (1996).

15. Telecommunications Act of 1996 § 551, 47 U.S.C. § 303(x) (1994 & Supp. III 1997).

a state-convened “private” board. It then blocks programming that is above a ratings threshold set by parents.¹⁶ The state appears to have created a “private” body to do something that it could not do directly and then implemented that body’s decisions through technological arrangements that it has mandated.

“Propertization”: Second, the attempt to extend and then protect intellectual property rights online will drive much of the regulatory agenda and produce many of the technical methods of enforcement. Legal and technical features developed to prevent the next Napster, such as pervasive digital IDs, can be turned to the purpose of collecting sales tax or preventing Internet gambling. At the same time, contentious political issues—such as the allocation of domain names, or access to corporate information on pollution—can be restated as “intellectual property issues.” This produces an anesthetic effect not only politically, but legally. Unfortunately, the Supreme Court’s current First Amendment jurisprudence is largely blind to speech issues when they are covered over by the veil of intellectual property.¹⁷

Technological Controls: Third, governance of the Internet, as Lessig so presciently points out, will depend upon hardwired technological controls. Rather than have the sovereign strike your head from your shoulders after you violate copyright (but only if you can be found, and your jurisdiction is agreeable), it is better by far to design the system so as to hardwire in the desired regulatory features. Digital texts and music could be encoded to a particular person. Detection devices could be built into players, so that you cannot play my music. Unique identifiers could be built into computer chips,¹⁸ so

16. See generally Kristin S. Burns, *Protecting the Child: The V-chip Provision of the Telecommunications Act of 1996*, 7 DEPAUL-LCA J. ART & ENT. L. 143 (1996); David V. Scott, *The V-chip Debate: Blocking Television Sex, Violence, and the First Amendment*, 16 LOY. L.A. ENT. L.J. 741 (1996).

17. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 532-533 (1987) (rejecting a First Amendment challenge to the USOC’s exclusive use of the word “olympic”). This attitude is in marked contrast to the Supreme Court’s attitude to other bodies of law that regulate private rights—libel, for example. See generally Boyle, *First Amendment in Cyberspace*, *supra* note 12; see also Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 354-55 (1999) (“We are in the midst of an enclosure movement in our information environment. In other words, our society is making a series of decisions that will subject more of the ways in which each of us uses information to someone else’s exclusive control.”).

18. See *Intel Drops Processor Serial Numbers*, Electronic Privacy Information Center, at http://www.epic.org/alert/EPIC_Alert_7.08.html (May 2, 2000) (on file with the *Duke Law Journal*) (detailing the controversy surrounding Intel’s decision to place Processor Serial

that your computer would broadcast a universal ID with an associated set of legal characteristics as you roamed the Net: *over eighteen years old, solvent up to a \$3000 credit limit, lives in a jurisdiction that prohibits marijuana, certain levels of obscenity and online gambling, etc.* Schemes such as the Platform for Internet Content Selection (PICS)¹⁹ and the Secure Digital Music Initiative (SDMI)²⁰ promise to use the power of network effects²¹ to establish de facto technical standards that achieve policy goals automatically.

These remarks are necessarily condensed, but their main thrust, I hope, is clear. Both deliberately, and because of the unintended consequences of industry lobbying and political inertia, “public” regulation of the Internet will increasingly be done through “private” specialized groups, whose decisions are couched in terms of technical standards and/or as neutral resolutions of property-right conflicts. The point is, of course, that ICANN fits precisely within these parameters. ICANN is a nonprofit corporation, formed in a backhanded, semi- demi-unofficial way by a bewildering blur of

Numbers (PSNs) in Intel Premium III and Celeron chips); John Markoff, *Microsoft Will Alter Its Software in Response to Privacy Concerns*, N.Y. TIMES, Mar. 7, 2000, at A1 (noting similar privacy concerns related to Microsoft’s corporate decisions).

19. See LESSIG, *supra* note 10, at 177-81; Boyle, *supra* note 5, at 191-93; Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453, 472-74 (1997).

20. SDMI has been criticized because in its attempt to link digital content to individual buyers, it might compromise the privacy of listeners. The concern is heightened by the behavior of existing businesses. Last year it was discovered that RealJukebox, the popular free program for playing digital music, was secretly reporting on its users. One observer noted:

[A]n independent Internet security consultant disassembled and analyzed RealNetworks’ Real Jukebox music software. Richard Smith discovered the program was assigning each person a globally unique identifier (GUID) when they registered the software and reported back to company headquarters with each user’s personal information every day. Before the *Times* article hit the stands, the software would report, among other things, the number and format of songs on the person’s computer, the type of music the person preferred, the type of audio player the person used, and the quality level of his or her recordings.

Robin Gross, *The Real Deal: Music Industry in Denial Over Privacy Concerns*, The Electric Frontier Foundation, at <http://www.eff.org/cafe/gross4.html> (Nov. 16, 1999) (on file with the *Duke Law Journal*). The official SDMI answer to this concern is hardly reassuring. In response to the question, “Will the privacy of users be compromised as a result of SDMI technology?” it gives the answer, “No. Any user who wants to legally distribute music anonymously on the Internet or elsewhere will be able to do so using any of a number of alternative technologies, such as MP3. And of course, the use of the SDMI system is entirely voluntary.” *Frequently Asked Questions*, Secure Digital Music Initiative, at <http://www.sdmi.org/FAQ.htm> (last visited Oct. 13, 2000) (on file with the *Duke Law Journal*).

21. Communication networks can only function if they have common standards and protocols. If the desired features of the network—for example, inanonimity, susceptibility to surveillance, or filtration—can be built into those standards themselves, it is very hard to defect from them without leaving the network and all of its benefits.

government agencies, deriving its power from some kind of claim to control (if not ownership) of the root file, the “A” server, and the domain name system. Its policy leverage comes from the power of network effects. If you want to play on the Internet, you have to play ICANN’s game. Its first order of business was the resolution of an intellectual property rights dispute—namely, the fight over trademarks for domain names.

This brings us back to the question I posed in the first paragraph of this Introduction. What does the Internet mean for administrative law? To reverse the question, if ICANN represents the future of Internet governance, what tools do administrative law and theory give us to subject such organizations to public review, and yet to leave space for individual private initiative and decision? Both papers offer us insight into, if not answers to, this question. From Professor Weinberg, we see the importance of continuing the analysis of legitimacy that administrative theory brings to bear on organizations exercising regulatory power. From Professor Froomkin, we have an interesting discussion of the role of the Administrative Procedures Act²² and the constitutional nondelegation doctrine. I will concentrate the remainder of my remarks on the latter because, if I am right about the future of Internet governance, it seems that it is the nondelegation doctrine that goes to the heart of the issue.

The form of delegation at issue here is not the “paradigm case” brought to mind by the phrase—standardless delegation of legislative tasks by the Congress to an administrative agency. As Froomkin notes,²³ strong constitutional control over delegation to administrative agencies was a victim of the Supreme Court’s “switch in time.” *Schechter Poultry*,²⁴ although never formally overruled on this point, was assumed (until recently²⁵) to have been robbed of any practical

22. Administrative Procedures Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994 & Supp. IV 1998) (establishing mandatory procedures for administrative rulemaking).

23. See Froomkin, *supra* note 3, at 143.

24. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). For another case in which the Supreme Court assumes strong constitutional control over delegation to administrative agencies, see generally *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

25. Though we must await the Supreme Court’s review of *American Trucking*, see *American Trucking Ass’ns, Inc. v. EPA*, 175 F.3d 1027, 1034-40 (D.C. Cir.), *modified in part and reh’g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted sub nom. Browner v. American Trucking Ass’ns, Inc.*, 120 S. Ct. 2003 (2000), and *cert. granted sub nom. American Trucking Ass’ns, Inc. v. Browner*, 120 S. Ct. 2193 (2000), to see if this judgment is accurate.

meaning: delegations are acceptable provided that an “intelligible principle” is provided to the agency receiving the delegated power.²⁶

More pertinent to ICANN, as Froomkin points out, is the private nondelegation doctrine, forbidding the transfer of public power to private entities. *Schechter Poultry* and *Carter Coal*²⁷ hold that private groups—for example, trade or industrial organizations—cannot be empowered to make law. While those cases mention the dangers of corruption, arbitrariness, and so on, there also seemed to be a deeper underlying fear: a blurring of the line between public and private, so that public sovereignty would be gifted to private parties, perhaps for populist, redistributive, or simply commercial, rent-seeking ends. From the standpoint of classical legal thought, such a move is bad on its own terms, but more importantly, it threatens not merely to blur but destroy the public/private division itself.²⁸ When Jaffe pointed out that contract law could be seen as a delegation of public “law making powers” to private parties,²⁹ classicists would only have seen their worst fears confirmed.

But has this doctrine survived the New Deal? Other scholars certainly do not think so. David Lawrence, for example, argues that “the private exercise of governmental power delegated by state or local governments [has not been] a federal constitutional issue, at least not since the 1920’s.”³⁰ Lawrence himself feels that there are dangers in such delegations, but that they are best handled under the law of due process.³¹ There is post-New Deal authority for the proposition that the courts will look more sternly on statutes which are penal, creating new rules of law in areas where no law or custom exists and delegating authority to private entities, and more favorably on those which are merely regulatory, which create remedies “known to existing law,” and which delegate power to public entities.³² Now, under this framework one can argue that ICANN is a classic example of a private entity creating new rules in an area of law that is (almost

26. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

27. *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-12 (1936).

28. For a discussion of the public/private distinction, see generally Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

29. See generally Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

30. David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 649 (1986).

31. See *id.* at 661-63.

32. *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947).

definitionally) novel. Arguing that ICANN's procedures are penal is also possible. Finally, one could argue that, because it is not explicitly empowered or created by statute, ICANN ought to be more vulnerable to challenge.

Is all of this a stretch, however? Is Froomkin describing the current law on delegation, or is this a plea for the courts to return to the world before the New Deal in order to deal with the world after the Internet? Some scholars have argued that the delegations to private parties are still constitutionally suspect. Professor Jody Freeman, for example, argues, "While the federal judiciary may decline to resurrect the nondelegation doctrine to invalidate delegations to administrative agencies, then, it might still invalidate private delegations in future cases, especially if the delegated authority implicates 'core' public powers."³³ In a very recent article, Professor Lisa Bressman argues for a "new" delegation doctrine, which focuses on improving, rather than preventing, delegations. In doing so, she notes the particular problems posed by private delegations:

Private lawmaking has a tendency to produce regulation that both interferes with individual liberty for suspect public purposes and inadequately reflects a broad public purpose to justify such interference. In this regard, private lawmaking is undemocratic even if it can be said to be efficient or rational on some other grounds.³⁴

These arguments strike me as normatively compelling, though I cannot help but notice that the conservative judges and scholars who are most critical of the administrative state and most willing to challenge the power of the federal government seem to have exactly the opposite set of prejudices.³⁵ They seem to view public

33. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 584 (2000).

34. Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1428 (2000).

35. See, e.g., *Printz v. United States*, 521 U.S. 898, 925 (1997) (Scalia, J.) ("The federal government may not compel the States to implement, by legislation or executive action, federal regulatory programs."); *United States v. Lopez*, 514 U.S. 549, 561-68 (1995) (Rehnquist, C.J.) (holding that portions of the Guns-Free School Zones Act of 1990 exceeded the authority granted to Congress by the Commerce Clause); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN passim* (1985) (challenging New Deal bureaucratic activism under a "takings" doctrine based in laissez-faire constitutionalism); Christopher C. DeMuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1077 (1986) (lamenting the "cumbersome" inefficiency of the U.S. Congress); Douglas H. Ginsburg, *Delegation Running Riot*, 18 REGULATION 1, at 84 (1995)

administrative agencies with skepticism and private exercises of power with benign optimism. But perhaps I am being unfair.

Whatever one thinks of the descriptive accuracy of Professor Fromkin's statement of the nondelegation doctrine, however, there is much to be said for it normatively, and in a context that goes far beyond ICANN. Internet regulation, whether through "private" bodies empowered by government, or by "neutral technology" backed by government standard-setting powers, should not escape completely from the world of democratic and constitutional review. This, I take it, is also Professor Weinberg's point. The private nondelegation doctrine could play an important role in encouraging greater scrutiny over the Internet regulation.

There is a nice irony here. Internet policy has been dominated by classical liberal and neo-liberal rhetoric, both inside and outside the law. Admiring (and rather formalistic) discussions of the role of property, contract, and private choice in creating digital space have often seemed to hearken back to classical legal thought. The job of the state was to define rights (expansively), allow contracts of adhesion, and then get out of the picture, secure in the knowledge that it was not regulating.³⁶ Professor Julie Cohen went so far as to label the tendency *Lochner in Cyberspace*.³⁷ How ironic it would be if this revival of classical legal thought, this exaltation of private ordering, were to be checked in some small part by a version of the nondelegation doctrine—which in its day was deployed to protect the classical legal scheme against the advent of the New Deal. The weapons used to hold back the advent of the administrative state might be turned to its contemporary defense. Not *Lochner*, but *Carter* in cyberspace.

(reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)):

So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes.

36. See James Boyle, *Missing the Point on Microsoft*, SALON (Apr. 7, 2000), at <http://www.salon.com/tech/feature/2000/04/07/greenspan/index.html> (on file with the *Duke Law Journal*); Boyle, *Net Total*, *supra* note 12.

37. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462 (1998).